Supreme Court, U.S.
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No. 87-1269

In The

Supreme Court of the United States

October Term, 1987

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; LEO HIMMELSBACH, District Attorney of Santa Clara County;
Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

The California Elections Code contains dozens of provisions pertaining separately to each of its ballot-qualified political parties and several which pertain to such political parties generally. Of these provisions, only those prescribing the membership of the state central committees of the California Democratic and Republican parties, the term of the chairpersons of the California Republican and Libertarian party state central committees and proscribing endorsement by state and county party central committees of candidates for the party's nomination for partisan office in the primary election were invalidated by the courts below.

Do these provisions constitute substantial and impermissable infringements on the First Amendment rights of the affected political parties and their members where the provisions reflect the policies of the parties, were enacted at their request and are necessary to enable them to enforce their policies in state courts.

Do these provisions constitute such infringements where a state provides the candidates of political parties with access to its general election ballot through means other than the primary election without regulation of the parties but reserves the privilege of state-conducted nomination elections and automatic access of candidates so nominated to the general election ballot to political parties which adhere to such provisions enacted to promote the state's interest in a stable and democratic system of government.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is set forth in volume I of the appendix to the jurisdictional statement (J.S.App.I) at pp. 2a-41a, is reported at 826 F.2d 814.

The orders and judgment of the United States District Court for the Northern District of California are not reported. They are set forth at J.S.App.II 42a-78a.

JURISDICTION

March Fong Eu, Secretary of State of the State of California, John K. Van de Kamp, Attorney General of California, Leo Himmelsbach, District Attorney of the County of Santa Clara, and Arlo Smith, District Attorney of the City and County of San Francisco, the appellants, appeal from the final judgment of the United States Court of Appeals for the Ninth Circuit, filed August 18, 1987 and amended October 29, 1987.

The judgment is subsequent to an order of this Court issued in this case on January 12, 1987, (— U.S. —, 107 S.Ct. 864, 93 L.Ed.2d 820) vacating the judgment of the Ninth Circuit and remanding to it for further consideration in light of this Court's decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. —, 107 S.Ct. 544 (1986). The Court of Appeals had jurisdiction pursuant to 28 USC § 1291 and Fed. Rules Civ. Proc. § 54(b). By order issued on October 29, 1987, the Court of Appeals denied appellants' petition for rehearing with suggestion for rehearing en banc. (J.S.App.I 6a)

By order filed November 17, 1987, the Court of Appeals denied appellants' motion to stay issuance of its mandate pursuant to Rule 41(b), Fed. R. App. P. until final disposition of an appeal to this Court. (J.S.App.I

61a). Notice of appeal to this Court was filed with the clerk of the Court of Appeals on November 19, 1987 and an amended notice of appeal was filed on January 14, 1988. (J.S.App.I 53a & 57a) Appellants' application to Justice Sandra Day O'Connor for a stay of the mandate was denied on December 4, 1987, after consideration of the written opposition of appellees.

This appeal was docketed in this Court within 90 days from the entry of judgment below. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(2).

This Court noted probable jurisdiction by order issued April 18, 1988 without the participation of the Chief Justice. (J.A. 130)

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ."

Fourteenth Amendment, United States Constitution:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 United States Code section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

California Elections Code sections:

8660, 8661, 8663, 8664, 8665, 8667 and 8669 (membership of the Democratic State Central Committee);

9160, 9160.5, 9161, 9161.5, 9162, 9163, and 9164 (membership of Republican State Central Committee);

9274 (term of chairperson of Republican State Central Committee);

9816 (applicable to term of chairperson of Libertarian State Central Committee);

11702 (prohibits endorsement by party state and county central committees of candidates for the party's nomination for partisan office at the primary election);

29102 (provides penalties for violations of laws relating to elections);

29430 (provides a penalty for claiming an endorsement as official candidate of political party in the primary election).

The text of the foregoing provisions of the California Elections Code, the enforcement of which against plaintiffs was prohibited by the judgment below, and of other provisions of the Code which were challenged but not invalidated in this litigation are set forth in J.S.App.II 288a et seq. A chart summarizing all of the provisions of the Elections Code relating directly to the California Democratic Party is set forth at J.S.App.I 63a et seq.

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STATEMENT OF THE CASE

The judgment of the Ninth Circuit reaffirms its previous judgment (792 F.2d 802) affirming summary judgment entered by the United States District Court for the Northern District of California on April 16, 1984.

The judgment of the District Court held that provisions of the California Elections (Cal. Elec.) Code prescribing the membership of the state central committees of the California Republican and Democratic parties, the terms of the chairpersons of the state central committees of the California Libertarian and Republican parties and prohibiting endorsements by state and county central committees of primary ballot-qualified political parties of candidates for their respective party's nominations at the primary election violated the Freedom of Speech and Free Association Clauses of the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and 42 USC § 1983, were therefore invalid and enjoined appellants from enforcing said provisions against plaintiffs.

The record of proceedings out of which these judgments arise is described below.

1. The Plaintiffs

The primary plaintiffs in the litigation before this Court are the National Committee for Party Renewal and its affiliates the Northern and Southern California Committees for Party Renewal. The Committees are "unincorporated associations of private citizens . . . dedicated to strengthening political parties . . . as participatory vehicles for the expression of the will of the citizenry . . . [and which include] among their membership persons who are active members and leaders of their respective political party organizations." (First Amended Complaint, ¶¶ 15-16; Dist.Ct.Doc. Entry (D.C. Doc.) # 4, filed Dec. 5, 1983)

For more than a year prior to the initiation of this litigation the attorney for the National Committee for Party Renewal, who is also counsel of record for the appellees before this Court, coordinated the Committees' effort to enlist organizations of California ballot-qualified political parties as plaintiffs in this litigation. (Appendix to Appellants' Briefs on Appeal, vol. X, pp. 15,49,112-113, filed with Court of Appeals July 23, 1984; Defendants' Reply Memo Re Authorization of Lawsuit, p. 10, filed with Court of Appeals on August 13, 1984.)

The record before the District Court does not demonstrate that prior to being contacted by the Committee any of the ballot-qualified state political parties had taken any official action to urge the repeal or amend any of the statutes which plaintiffs have challenged as members thereof or to adopt by-laws inconsistent therewith. Moreover, evidence filed with the Court of Appeals demonstrates that the only purported plaintiff Republican organization, the San Francisco County Republican Central Committee, did not in fact authorize participation in this litigation pending in the District Court. (App. to Appellants' Briefs on Appeal, vol. IX, 58-61, filed with Court of Appeals on May 8, 1984; vol. X, pp. 7:17-19, 84-87, 104:3-8, filed July 23, 1984; vol. VII, pp. 936-937, filed April 16, 1984.)

The state central committees of the California Democratic and Republican parties are not plaintiffs nor are they otherwise parties to this litigation. Moreover, the record of the proceedings in the District Court indicates that the by-laws of the Democratic and Republican state central committees are not inconsistent with the statutes challenged in this litigation. (Exhs. 2 & 3 to Defendants' Opposition to Motion for Summary Judgment filed March 29, 1984; DC Doc. # 56; J.S.App.II a-140 *et seq.*)

The State Central Committee of the California Libertarian party is purportedly a plaintiff as to each of the three claims for relief set forth in the complaint. (First

Amended Complaint, pp. 13:7-8, 23:11-12, 35:27-28, DC Doc. # 4 filed December 5, 1983; J.S.App.II a-243.) However, the minutes of the November 21, 1982 meeting at which it is claimed that the Committee's participation in all three causes of action was authorized (Gingell decl., p.2, filed April 6, 1984, DC Doc. #70) indicate that there was authorization for participation in the second claim for relief only[1] and that was contingent on subsequent circumstances. (App. to Appellants' Briefs on Appeal, vol. X, p.83, filed July 23, 1984.)

The minutes of subsequent meetings of the State Central Committee provided by plaintiffs to supplement the record on appeal do not indicate that the subsequent conditions were ever fulfilled or that the purported authorization was expanded to include all three claims for relief. (Appendix to Appellants' Briefs on Appeal, vol. X, pp. 105-111, filed July 23, 1984.) The by-laws of the Libertarian State Central Committee do not conflict with he statutory prescription of the terms of its chairperson. (*Id.* at 72-81.)

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1. The second cause of action challenged the alleged statutory prohibition on endorsements of candidates for non-partisan office by central committees of political parties. (First Amended Complaint, pp. 77-89, filed Dec. 5, 1983, DC Doc. # 4) The District Court abstained from consideration of this cause of action because the question was then pending before the California Supreme Court but retained jurisdiction. (Dist. Ct. order entered April 16, 1984, p. 3:1-12, Doc. # 83) On December 27, 1984, the California Supreme Court held that California law did not prohibit such endorsements. (*Unger* v. *Superior Court* (1984) 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238) At the June 3, 1986 primary election Proposition 49 to amend § 6 of art. II of the California Constitution to prohibit party central committees from endorsing candidates for nonpartisan offices was adopted by 55.9% of the vote. (Statement of the Vote by the California Secretary of State for June 3, 1986 Primary Election, at p. 50.) The complaint has not been amended to challenge this provision and no further proceedings have been conducted in the District Court on the second claim for relief.

The remaining plaintiffs are purportedly six Democratic party county central committees (there are 58 counties each with such a committee), chairpersons of most of the purported plaintiff central committees, and five individual party members (three Democratic and two Republican) of varying degrees of involvement in their respective party activities, some of whom are members of the Committees For Party Renewal. (First Amended Complaint, pp. 3-6, filed Dec. 5, 1983, DC Doc. #4; J.S.App.II a-245-a-249.)

Only four of the six purported plaintiff Democratic county central committees joined in the first claim for relief challenging Cal. Elec. Code, § 11702 which prohibits the state and county central committees of ballot-qualified state political parties from endorsing candidates for their respective party nominations for partisan office in the primary election. (First Amended Complaint, p. 13; J.S. App.II a-255.)[2] No Republican organization is a plaintiff as to the first claim for relief.

Members of county central committees are elected by members of their party residing in the county at primary elections conducted by the state. (See e.g., Cal. Elec. Code, § 8870, et seq.) The primary role in party affairs which county central committees are elected to perform is, under the general direction of the state central committee, to conduct their party's campaign in the general election for its nominees for partisan office selected at the primary election.[3] (Cal. Elec. Code, § 8940, 9276, and 9850.) The

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2. The Los Angeles County Democratic Central Committee joined only in the second claim for relief challenging the supposed statutory prohibition on committee endorsements for nonpartisan office. The Solano County Democratic Central Committee is not named as a plaintiff to the first claim for relief.

3. Although members of central committees are elected at the June primary election, they typically do not assume their duties until January of the following year so that the committee in existence at the primary conducts the party's campaign at the November general election. (Cal. Elec. Code, §§ 8920 [Democratic]; 9420 [Republican].)

derivative obligation not to endorse, support, or oppose candidates is the traditional limitation on the authority of central committees in California party politics that is enforceable by party members through the existence of Election Code § 11702. (Exh. 1 pp. 4-5 to Defendants' Opposition to Motion for Summary Judgment filed March 29, 1984; DC Doc. #56.)

Thus, county central committee members are elected knowing and on the condition that as a committee they will not endorse, support, or oppose candidates for their party's nomination in the primary election. Notwithstanding the reliance by their fellow party members on this restriction on the mandate of county committees in electing the members thereof, plaintiff committees have through the judgment below unilaterally terminated a duty of their offices and eliminated the ability of their fellow party members to enforce it.

2. The Claims For Relief

There is nothing in the record before the District Court which demonstrates that the policy of plaintiffs' respective parties is to authorize committee endorsements of candidate for the parties' nomination. Notwithstanding the apparent absence of such party policies favoring endorsements by state or county central committees, individual county committee chairpersons by virtue of their simultaneous membership on their respective state central committees and several other individual members thereof challenged the application of the statutory prohibition to state central committees in the first claim for relief. (First Amended Complaint, p. 17:1-18; J.S.App.II a-258-a-259.) These plaintiffs claimed that this prohibition did not permit them to "pursue or advocate political positions which they and other party adherents wish to espouse" and "to exercise their right to associate together with other party adherents to express their political beliefs." (*Id.*)

The third claim for relief challenged state statutes which prescribed the composition and selection of the state central committees of the state Democratic and Republican parties, the terms of the chairpersons of the state central committees of the California Republican and Libertarian parties, the time and place of meetings of state and county central committees of each of the three state parties implicated by the litigation and limits on the amount of dues the central committees can charge their members. (First Amended Complaint, pp. 36-41; J.S. App.II a-276-a-282.)

3. The Answers of Defendants

Answers were filed on December 20, 1983 by the defendant District Attorney of Los Angeles County (DC Doc. #11) and on December 16, 1983 by the defendant Attorney General of California on behalf of himself, defendants Secretary of State of California and the district attorneys of San Francisco, Santa Clara, and Placer counties.[4] (DC Doc. #6.)

The answers placed the material allegations of the complaint at issue; challenged the subject matter and constitutional jurisdiction of the District Court; raised the insufficiency of the complaint to establish plaintiffs' capacity and standing to sue; objected that necessary or interested parties had not been joined; urged that the court abstain from exercising jurisdiction as to any cause of action so that state courts could determine enforcement responsibility, the scope of the challenged statutes and their constitutionality and because the issues were not

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4. Defendant district attorneys of Alameda, Contra Costa and Solano counties filed answers by way of disclaimer of interest in the litigation on December 16 and 27, 1983 (DC Doc. ## 7, 8 & 12) and sought leave to refrain from participation therein which was granted by the District Court. (Order entered March 2, 1984; DC Doc. # 20; J.S.App.II a-235.)

ripe for adjudication and were political questions; contended that complaint failed to allege facts sufficient to confer jurisdiction pursuant to the federal statutes cited therein; and asserted the failure of the first amended complaint to allege facts for which relief could be granted against defendants.

4. Activity In The Case Before Plaintiffs' Motion For Summary Judgment

On or about December 20, 1983, plaintiffs served sets of requests for admissions and production of documents and interrogatories on the Secretary of State and the Attorney General. (DC Doc. #9.) The responses to discovery which defendants provided plaintiffs on or about January 31, 1984 were voluminous and had been very time consuming to locate, assemble and produce. (DC Doc. #14 & 15.)

After the responses to discovery were provided by defendants, responsibility for representing defendants was reassigned to another deputy attorney general in late January 1984 because the previously assigned deputy took a leave of absence. (Graybill decl. in opposition to mtn. for sum. judgmt., p. 5:21-26, filed March 29, 1984; DC Doc. #57; J.S.App.II a-118.)

Defendants represented by the Attorney General and the defendant District Attorney of Los Angeles County filed a joint status conference certificate on February 21, 1984 (DC Doc. #18; J.S.App.II a-237) for the status conference scheduled by the District Court to be held on February 27, 1984. These defendants informed the court that they intended to raise standing and jurisdictional issues and to conduct discovery with regard to those issues and requested that the court issue an order limiting discovery to jurisdictional and standing issues only pending a ruling on defendants' anticipated motion to dismiss or for summary judgment based on those grounds. (*Id.*, p. 3.)

Plaintiffs' status conference certificate (pp. 4-5) requested the court to specially set a hearing on their motion for summary judgment which they announced would be filed on or about March 2, 1984. (DC Doc. #17.) Plaintiffs had been preparing their case for more than a year before it was filed. (App. to Appellants' Briefs on Appeal, vol. X, pp. 15,49,112-113, filed July 23, 1984; Defendants' Reply Memo Re Authorization of Lawsuit p. 10, filed with Court of Appeals on August 13, 1984.)

At the status conference held on February 27, 1984, the court informed defendants that plaintiffs' anticipated motion for summary judgment would proceed at the earliest possible time permitted by its calendar in light of the California primary election pending in June, 1984. (R.T. of status conf., p. 5:15-19 (DC Doc. #82); J.A. 29.) The court ordered that all motions and supporting documentation be filed the following Monday, March 5, 1984 for hearing on April 2, 1984. (R.T. of status conf., p. 7:12-17; J.A. 31.) With regard to defendants' need to conduct discovery in connection with their motion to dismiss or with opposition to plaintiffs' motion for summary judgment the court stated (R.T., p. 9:13-25; 10:1-2,11-14; J.A. 33):

> "The Court: Counsel, let's do this, because the time is short, admittedly. I will give you a chance to respond to their motions for summary judgment without any discovery in your response. If you need additional discovery, set forth a response what additional discovery you need and approximately how much time you need to do it. I will not rule on any motion for summary judgment if there is discovery that needs to be done in order to address it. . . . If you can make a good showing in your papers as to why you need discovery on the motion to dismiss, then I will consider whether some appropriate time is necessary in order to allow you to do discovery on that, as well . . . . I will not resolve that motion [summary judgment] if it appears that there is discovery that needs to be done without giving you an opportunity to do discovery, which of course the rules [Fed. R.Civ.P., Rule 56 (f)] provide for." (Bracketed info. added.)

The court also requested that plaintiffs cooperate with defendants by providing defendants with informal discovery as needed to prepare the opposition to the motion for summary judgment. (R.T. 10:21-25; J.A. 33-34.)

5. Defendants' Motion To Dismiss

As ordered, defendants filed a motion to dismiss on March 6, 1984. (DC Doc. #48.) Defendants demonstrated that the first amended complaint did not and could not properly allege defendants had threatened to enforce the challenged statutes against any plaintiff. The inability to allege such threatened activity precluded the existence of a case or controversy between any plaintiff and any defendant necessary to establish federal jurisdiction pursuant to Art. III of the U.S. Constitution.

As to their third claim for relief regarding statutes prescribing the organization and procedures of the central committees, plaintiffs alleged that Elections Code § 29102 made it a criminal offense prosecutable by defendants for central committees and officers thereof to adopt and conform to organization and procedures which conflict with those prescribed by statute. (First Amended Complaint, ¶¶ 17-25, 62-63; J.S.App.II a-249-a-251 & a-280-a-281.) Plaintiffs asserted the threat of such enforcement inhibits them from deviating from the statutorily prescribed organization and procedures and from recommending that their parties conduct their affairs in unspecified ways "best suited to achieve the parties' objectives." (First Amended Complaint, ¶¶ 64-66; J.S.App.II a-281.)

Defendants pointed out that violations of the challenged statutes are not criminal offenses defined by Elections Code § 29102 which provides:

> "Every person charged with the performance of any duty under the provisions of any law of this state *relating to elections*, who willfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment is prescribed by this code, punishable by fine not exceeding one thousand dollars ($1,000) or by imprisonment in the state prison for 16 months or two or three years, or by both." (Emphasis added.)

Not only are the purported plaintiff committees not "persons" within the meaning of the section, but none of the statutes challenged in the third claim for relief prescribe any duties "relating to elections" with respect to plaintiffs or anyone else.

Thus, the only basis for inferring a threat of enforcement of the provisions by defendants against any plaintiff was non-existent as a matter of state law. There being no threat of enforcement by defendants, plaintiffs had failed to allege the existence of a case or controversy with defendants concerning the application of those statutes to them as required by Art. III.

Defendants also demonstrated that plaintiffs had not alleged and could not allege an actual threat of enforcement by defendants against them or anyone else of the statutory ban on endorsements by central committees for nomination for partisan office. The sole basis for plaintiffs' claim of injury threatened by defendants (First Amended Complaint, ¶¶ 36-39; J.S.App.II a-255-a-256) was that violation of the ban on endorsements by central committees set forth in Elec. Code § 11702[5] was punish-

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5. Elections Code § 11702 provides:

"The state convention, state central committee, and the county central committee in each county are the official governing bodies of a party qualified to participate in the direct primary election. The state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for nomination of that party for partisan office in the direct primary election."

able as a criminal offense pursuant to Elec. Code, § 29430 which provides:

> "No candidate for the nomination of a political party for a partisan office in the primary election shall claim, nor shall any other person claim on his behalf, that he or she is the official candidate or the officially endorsed candidate of such political party. A violation of this section by any person shall constitute a misdemeanor."

§ 29430 literally does not make endorsement by a central committee or the claim of endorsement by a committee a criminal violation; it is the claim that such an endorsement constitutes endorsement of the "political party" that is subject to criminal sanction. The prohibited claim is inherently fraudulent because the only possible "official candidate" or "officially endorsed candidate of such political party" is the nominee selected at the primary election. (Elec. Code, § 6610.)

Plaintiffs' interpretation of §§ 11702 and 29430 as imposing a duty to prosecute them for any violation of § 11702 was the sole basis for their inference of a threat of enforcement by defendants against them. There were no allegations of actual threatened prosecutions or other enforcement of these statutes by any defendant against anyone in the past. Thus, there was no actual case or controversy with respect to any defendant.

Defendants also contended that an interpretation by a federal court that violations of the challenged statutes by plaintiffs would constitute criminal conduct under state law, which defendants would have a duty to prosecute, in the absence of any state precedent for that interpretation or of actions by defendants consistent with that interpretation would violate the state's rights under the Eleventh Amendment as interpreted by this Court in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

The failure of the complaint to allege injury from the existence of any challenged statute to any interest of any plaintiff protected by the First Amendment was another basis for the motion to dismiss. Purported plaintiff central committees and most of their chairpersons alleged a myriad of reasons they believe the best interests of their parties require that they as organizations of their respective political parties and adherents thereof should not be prohibited from endorsing candidates for the nomination of the party in the primary election.

However, there are no allegations that the political parties themselves have manifested policies which concur with plaintiffs' views that endorsements by central committees are in the best interests of the parties.

The First Amendment interests alleged by plaintiffs all pertain to their right as party organizations to express their views and to be heard as such by other party members. (First Amended Complaint, ¶¶ 15-16; J.S.App.II a-248.) There being no allegation that the parties have bestowed such rights on plaintiffs, the statutes which prohibit such conduct cannot be said to violate the First Amendment rights claimed by plaintiffs to be derived from their membership and association as political parties. Moreover, the county central committees having been elected on the premise that they cannot endorse candidates, the need for manifestation of party policy authorizing endorsement should be essential for standing to challenge the statute.

Defendants also contended that the plaintiffs' allegations that but for the challenged statutes prescribing organization and procedure they would recommend that the current rules be abolished and replaced by unspecified different rules (First Amended Complaint, ¶ 66) were insufficient to establish injury which would sustain standing to challenge the statutes. The statutes don't prohibit them from advocating change or preclude the committees

from adopting policy statements conflicting with the statutes.

There is no allegation that the challenged statutes do not reflect the will of the parties or that the parties have tried to change their organizations only to be prevented from implementing them by the existence of the statutes. Plaintiffs sought to invoke First Amendment rights of their respective parties without any manifestation that the statutes conflicted with the policies of those political parties.

6. Plaintiffs' Motion For Summary Judgment

On March 5, 1984, plaintiffs filed a motion for summary judgment consisting of 350 pages of documentation including 25 declarations and 19 exhibits excluding the numerous exhibits attached to many of the declarations. (DC Doc. #s 41-47 & 50.) Fifteen of the declarations were by individual named plaintiffs. (DC Doc. #s 22, 24, 28, 30-35, 40-41, 47 & 50.) Only two of the declarations of individual plaintiffs makes any reference to the position of his or her political party with regard to the statutes challenged in this litigation. (Gingell, Doc. #24; App. to Motion to Affirm or Dismiss (M.A.D. App. 24a and Coffey, Doc. # 40; M.A.D. App. 9a.)

The Gingell declaration does not ascribe any position to the Libertarian Party or to the state central committee thereof regarding the ban on endorsements by central committees of candidates for the party's nomination for partisan office in the primary election. Ms. Gingell does not express the opinion which is standard in the declarations of most of the other party committee member plaintiffs that absent the statutory ban any Libertarian party central committee would make endorsements for the nomination of the party. Ms. Gingell expresses her personal opinion that Libertarian party organizations should be free to make such endorsements for the good of the party. (P. 2:9-15; M.A.D. App. 25a.) The only statements in the Gingell declaration regarding the party concern its purportedly being required to organize itself by county instead of by region as it had done prior to becoming a ballot-qualified party in 1980. (P. 2:23-28; M.A.D. App. 25a-26a.) This information is irrelevant because the First Amended Complaint does not challenge the statutes which prescribe that organization for the Libertarian central committees.

Other than the county-region distinction Ms. Gingell does not specify in what manner the party is "still burdened by having to establish a totally new statewide organization that differed from our preferred and natural party structure." (P. 3:1-9; M.A.D. App. 26a.) These gaps in her ability to specify any differences may be explained by the fact that Ms. Gingell did not become an active participant in party activities until a year after it became a ballot-qualified party. (P. 2:2-21; M.A.D. App. 25a.)

Moreover, her lack of specificity may be the result of the absence of any official manifestation of party incompatibility with the statutory organization and procedures. Although Ms. Gingell asserts that the "Libertarian Party has unsuccessfully tried to persuade the State Legislature to enact legislation specifically tailored to our organizational needs" (p. 3:10-17; M.A.D. App. 26a), the specifics of the legislation are not discussed, a copy of the legislation is not attached and there is no explanation of what official actions of the Party manifest this legislation as the policy of the Party.

The declaration of Mr. Coffey, a member of the Democratic State Central Committee and its chairperson from 1977-79, does not ascribe any position to the state central committee or to the party regarding whether central committees should be permitted to make endorsements of candidates for the nomination of the party for partisan office or of candidates for non-partisan office.

Mr. Coffey does assert that "the Party" had been engaged in efforts to reform its organizational structure

for twenty years prior to his becoming chairperson of the state central committee in 1979. (P. 4:7-18; M.A.D. App. 12a.) Mr. Coffey does not explain what he means by his reference to "the Party". However, he does describe his version of how legislation was enacted during his term as chairperson changing the composition of the state central committee to provide more representation for county committees as he and "other members of the Party leadership" had proposed. (P. 4:19-28; M.A.D. App. 12a.)

There is no indication of any formal action by "the Party" endorsing the legislation he proposed and Mr. Coffey asserts that "[a]lthough the Legislature finally agreed to change the rules, they did so only after a protracted, hard fought battle and even then substantially deviated from the Party's proposal". (*Id.*) The absence of any formal party endorsement for his proposals and the resultant need for the Legislature to attempt to ascertain the position of "the Party" is a very likely explanation for the deliberation afforded the legislation in the legislature.

Although Mr. Coffey is personally dissatisfied with the current rules regarding the composition of the state central committee because he believes county committees are still underrepresented (p. 4:27-8; 5:1-4; *id.*), he does not ascribe that view to "the Party" nor does he assert that any other feature of the challenged statutes conflict with the policies of "the Party."

The declaration of Edmond Constantini, a member of the Democratic State Central Committee who is not a plaintiff, is the only other declaration submitted in support of plaintiffs' motion which makes reference to the policies of a political party implicated by this litigation. (DC Doc. #46; M.A.D. App. 14a.) Mr. Constantini refers to the same legislation enacted in 1979 regarding the composition of the state central committee described in Mr. Coffey's declaration. (P. 2:20-28; M.A.D. App. 15a-16a.)

He does not indicate that party policies are inconsistent with the statutes challenged in this litigation.

Moreover, Mr. Constantini cites an incident where the legislature eliminated legislation which would have changed the statutes to conflict with the rules of the state central committee. *(Id.)* Notwithstanding the demonstrated responsiveness of the legislature to manifested party policy, Mr. Constantini believes the legislature has no legitimate role in superintending the rules of the state central committee. *(Id.)* However, he does not ascribe this view to the party.

The declarations of other central committee member plaintiffs essentially reiterate the conclusory material allegations of the complaint. Defendants contended in their motion to dismiss that these allegations were insufficient to establish injury to any plaintiff's individual First Amendment rights, to establish any injury resulting from the existence of the statutes or to establish any threatened action by any defendant which impairs the First Amendment rights of any plaintiff. The material allegations are supplemented with anecdotes and expressions of personal opinion regarding the best interests of the pertinent political parties.

Of particular significance is the "boilerplate" assertion of many of these declarations concerning the purported right of county central committee members to associate together in that capacity to make endorsements to educate the less well informed members of their respective parties (Mack declaration, p. 4:1-10; DC Doc. #43; see also, #21,¶ 10; #28,¶ 7; #31,¶ 7; #33,¶ 8; #34,¶ 6; #35,¶ 18; #37,¶ 12; #47,¶ 12):

> "I became a member of the County Central Committee because I shared the political beliefs of the other members of that organization. I thought that the County Central Committee could advance these shared political beliefs far more effectively than I

could as a single individual. Even as chairperson of that Committee, my individual endorsement is worth far less than the collective endorsement of the County Central Committee as a whole. Since the Committee cannot endorse in primary or non-partisan campaigns, our whole purpose in associating together has been frustrated."

Most of the declarations also repeat the standard assertion that the county committees would like to endorse candidates for the party nomination in the primary election and would do so but for the existence of the statute prohibiting it. However, there are no references to official action of any type by the committees manifesting an intent to do so or to authorize participation in this litigation.

None of the declarations refers to any policy of the affected political party mandating or authorizing or encouraging county central committees to perform the endorsement function in the interests of the party. Moreover, the declarations do not claim a mandate for committee members from the party members who elected them pursuant to the statutory conditions that the committees will not make endorsements of candidates for the party's nomination in the primary election and that the primary function of the committees is to carry out the party's campaign for its nominees in the general election under the supervision of the state central committee.

The declarations also typically assert that the party members have a need for information regarding candidates for the nomination of the party uniquely available from central committees. However, one of the expert opinion declarations submitted by plaintiffs in support of their motion cites research which indicates that an overwhelming majority of party voters do not consider endorsements by party organizations meaningful in making their decisions on candidates in primary elections. (Jewel decl., ¶¶ 14-15; DC Doc. #44; J.A. 97-98.)

7. Defendants' Response to the Motion for Summary Judgment

In reviewing the plaintiffs' documentation in support of their motion for summary judgment it was apparent that plaintiffs had not remedied the failure of the First Amended Complaint to demonstrate that the challenged statutes conflicted with the policies of the affected political parties. Based upon this analysis and other information that became available to defendants, there was good reason for defendants to believe that they could develop evidence establishing that, especially with regard to the Democratic and Republican parties, the challenged statutes were enacted at the request of and with the active support of the affected political parties and reflected their current policies.

Not only would this evidence highlight the gaps in the documentation in support of the plaintiffs' motion for summary judgment but the evidence would also demonstrate the absence of a substantial infringement on the asserted First Amendment rights of plaintiffs and the implicated issues of standing and Art. III jurisdiction and would focus on one of the aspects of the state's compelling interests promoted by the challenged statutes—promoting the stability and democratic nature of its ballot—qualified political parties by enabling them to enforce their own policies in state court. However, defendants were aware that this information could not be developed within the time alloted by District Court rules to respond to the motion for summary judgment.

Accordingly, defendants applied to the District Court for a three week extension of time to develop the information some of which would have to come from sources not under the control of either plaintiffs or defendants. Hearing the defendants' application by telephone conference on March 12, 1984, the District Court granted a one-

week extension of the hearing on the motions to dismiss and summary judgment to April 9, 1984. (R.T., DC Doc. #93; J.A. 37; Order, Doc. #52.) In so ruling the Court stated (R.T. 12:15-25; 13:1-2; J.A. 41):

> "I know that doesn't give defendants as much time as they asked for, but time is critical. I am keeping in mind the burden that you do have.
>
> "If there are factual issues that you have not been able to reach, either because of discovery or investigation problems, then I suggest what you do is that you set those forth, those problems forth in your papers when you file them. Now, it is not automatically going to give you additional time to file papers after the hearing. So don't depend on that. But if those are critical, and you have not been able to compile whatever factual matters that you have to have in order to respond, you may set those forth in your papers here when you file them on March the 26th."

In light of these time constraints and mindful of the Court's suggestion at the status conference regarding informal discovery from plaintiffs, defendants sent a letter to plaintiffs' counsel making specific requests for information in plaintiffs' possession which might demonstrate the position of their respective political parties on the statutes challenged in the litigation. (J.S.App.II a-120 - a-124.)

Defendants also requested any minutes which plaintiffs assert reflect conflict between their own policies and the challenged statutes and by-laws with which to determine whether such policies were effected as required thereby. *(Id.)* This information could be pertinent to establishing that the statutes complained of did not substantially infringe on the alleged rights of the committees. Moreover, the failure to comply with by-laws would provide evidence of the need for state statutes establishing procedures for parties enabling members to enforce them in state court. The information would also be relevant to

whether the plaintiffs who were invoking the equitable jurisdiction of the court were themselves before the court with "clean hands" and having done equity themselves.

Plaintiffs did not provide defendants with any of the requested information prior to their filing their opposition to plaintiffs' motion for summary judgment and their cross-motion for summary judgment on March 29, 1984. (DC Doc. #s 55-57.) Defendants were unable to secure most of the requested information on their own and filed with their opposition a declaration of counsel describing what efforts had been made to secure the necessary information and what more needed to be done in order to respond to plaintiffs' motion as had been suggested by the District Court pursuant to Rule 56 (f), Fed. Rules Civ. Proc. (Graybill decl.; J.S.App.II a-114 - a-124.)

Amongst the information which defendants had acquired but could not yet document was that the Executive Board of the Democratic State Central Committee had rejected a resolution to join as a plaintiff in this litigation. (J.S.App.II a-116.)

In opposition to plaintiffs' motion for summary judgment, defendants submitted the by-laws of the Democratic and Republican state central committees. (J.S.App.II a-149 - a-231.) These documents showed that there was no conflict between the by-laws and any of the statutes regarding organization and procedures of the state central committees challenged in the third claim for relief. The documents do not contain any statements authorizing endorsements by any central committees.

Defendants also submitted the declaration of a recently retired state senator with over twenty years experience in the State Legislature and on the Democratic State Central Committee. (J.S.App.II a-105 - a-112; J.A. 60-69.) Albert S. Rodda declares on personal knowledge that the Democratic and Republican parties supported the statutory

ban on endorsements by party central committees because the divisiveness on the committees created by the process of endorsement impairs the ability of the committees to carry out the primary function assigned them by the parties of carrying out the party's campaign for the nominees selected at the primary election and utilizing the resources of previously contending factions in that effort. (J.A. 63-66.)

Moreover, the senator stated that statutes governing the internal affairs of the Democratic and Republican central committees were enacted at the request of and with the active support of the party affected without interference from members of the opposite party. (J.S.App.II a-106; J.A. 63.)

Defendants also submitted an opinion of the Attorney General issued in 1954 which demonstrated that the ban on central committee endorsements had been the unvarying policy and practice of the California Democratic and Republican parties continuously since before the advent of the direct primary system for the same reasons recounted by Senator Rodda. (J.S.App.II a-140 - a-148.)

All defendants or authorized representatives thereof submitted declarations establishing that their offices had never been involved in the enforcement of any of the statutes challenged in this litigation and expressed the opinion that violation of these statutes, as contemplated by plaintiffs, did not constitute criminal offenses. (J.S. App.II a-93 - a-104, a-125 - a-139.)

In their brief in opposition to the plaintiffs' motion for summary judgment and in support of their own, defendants set forth the interests of the state which justify the challenged statutes in the event, which had not been established by plaintiffs, that they conflicted with the policies of the affected political parties. (DC Doc. #56, pp. 14-27.) California recognizes the participation of political parties in its electoral system only if the parties are willing to conduct their functions in a manner which

promotes the state's interest in the stability and democracy of its electoral and governmental system. Otherwise the political parties can qualify their candidates for the general election ballot as independents or write-ins without regulation by the state.

If central committees endorse candidates for the party's nomination in the primary election, they will too often be disabled by divisiveness left over from that process to conduct an effective party campaign for the nominees in the general election and therefore the state prohibits such endorsements. There is no less restrictive method than an outright ban on endorsements to preserve that effectiveness.

The state also requires certain aspects of the organization and procedures of central committees including the composition of the state central committees and the terms of their chairpersons be subject to ratification in statute to assure that these factors are representative of the party and conducive to the stability of the central committee to carry out its campaign function. Codification of the rules also enables any member of the party to enforce them in state court.[6]

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6. Without the statutes unrepresentative minorities on central committees can change the by-laws or take action in the name of the committees such as in the case of state central committees to disenfranchise other committee members with whom they disagree without an opportunity for timely recourse by other committee or party members. An example of how this could occur is provided by the by-laws of the Democratic State Central Committee which consists of over 1,000 members (Court of Appeals Opinion, J.S.App.I 13a, 826 F.2d at 820). Pursuant to § 1 of art. VIII of the by-laws an executive board of approximately 280 members is vested with all of the powers of the central committee when it is not in session. (J.S.App.II a-193 - a-194) § 6 of art. VIII provides that as few as 50 members thereof constitute a quorum for the transaction of any business. (J.S.App.II a-195)

(Continued on following page)

It is apparent from the variance of the details of the same types of statutory organizational prescriptions applicable to the several ballot-qualified parties that the Legislature ratifies proposals which have widespread support within the parties and provides a wide variety of options for organizational and procedural features which promote its interests in democratic and representative party organizations and the resulting stable governmental system. Thus, the regulations are intrusive on the options of the parties only to the extent necessary to promote the states interests therein.

On Friday April 6, 1984 plaintiffs filed five declarations of plaintiff county committee members concerning authorization of the lawsuit by these committees. (DC Doc. #s 70-74.) Defendants' counsel did not receive copies of these declarations prior to the hearing on the motions on Monday April 9, 1984. (R.T. 47:5-9; 49:20-25; 50:1-10; J.A. 46, 48-49; DC Doc. #81.) Moreover, there were no committee minutes regarding authorization or committee by-laws attached to the declarations.

8. The District Court's Decision

At the hearing on the motions held on April 9, 1984. the District Court announced its rulings thereon.

The court denied defendants' motion to dismiss.

(Continued from previous page)

Pursuant to subdiv. (d) of § 1 of art. X as few as 34 members of the executive board can amend the by-laws. (J.S.App.II a-200) Moreover, resolutions can be presented without notice at any time during a meeting of the board and, if no members of the resolutions committee present at the time object, can be adopted by a vote of as few as 26 members of the executive board pursuant to § 7(d) of art. VIII. (J.S.App.II a-196) An example of utilization of this process is provided in the supplemental declaration of Edmond Constantini, pp. 2:6-28, 3:1-8, filed April 2, 1984. (DC Doc. #61.)

It found that the plaintiff central committees had in and of themselves, notwithstanding the policy of their parties' as a whole, the right to associate and endorse candidates for their parties' nominations and to associate to determine the composition of their state central committees and the terms of the chairpersons thereof which are protected by the First Amendment. (R.T. 52:17-20; 53:10-17; J.A. 54-55.)

The challenged statutes prohibited the endorsements and inhibited the ability of plaintiffs to effect change in the organization of the state central committees which constitute a substantial burden on those rights. (R.T. 55:9-21; J.A. 57.)

The court disagreed with the defendants' interpretation of the penal statutes cited by plaintiffs and held that they were applicable to plaintiffs if they violated the challenged statutes and that defendants would have an obligation under state law to prosecute defendants for such violations. (R.T. 53:17-23; J.A. 55.) Moreover, the court concluded that it was not precluded from making such a finding by the Eleventh Amendment as applied in *Pennhurst*. (R.T. 52:21-28; 53:1-9; J.A. 54-55.)

The court was especially concerned that the continued existence of the statutes would enable other party members to disrupt the activities of central committees through civil litigation based thereon. (R.T. 54:23-25; 55:1-22; J.A. 56-57.)

The court granted plaintiffs' motion for summary judgment with regard to the ban on endorsements in partisan primaries and the statutory prescriptions of state central committee composition and terms of chairpersons because it found that defendants had failed to make an adequate *factual* showing to support their asserted state interests served by the challenged statutes and had failed to adequately respond to the declarations submitted by plaintiffs. (R.T. 56:1-18; J.A. 57.)

The court denied defendants any opportunity to conduct further discovery or make further submittals with regard to the motions and its intended ruling (R.T. 51:9-25; 58:4-11; J.A. 53, 59) stating:

> ". . . I would deny a stay, and you may indicate in the order, if you want a stay you can go to the Ninth Circuit for maybe not so humble an opinion as mine."

On April 16, 1984, the court issued its order and judgment. (J.S.App.II a-67 - a-73.) The order and judgment reflected the Court's ruling at the hearing on April 9 and provided that the judgment would be final pursuant to Rule 54(b), Fed.R.Civ.P. notwithstanding that some claims set forth in the complaint had not been resolved.[7]

9. Proceedings In The Court Of Appeals

On April 16, 1984, defendants filed their notice of appeal from the judgment. (DC Doc. #85.) On the same date defendants filed an emergency motion for stay on appeal. The primary basis for the motion was that county central committees would be exercising the right to endorse candidates for their party's nomination in the upcoming primary election contrary to the mandate on which they were elected by their fellow party members if the stay were not granted pending resolution on the appeal.

On April 19, 1984, plaintiffs filed with the District Court two additional declarations of plaintiff committee members regarding committee authorization of this litigation. (DC Doc. #s 88-89.) Neither of the declarations included any documentation such as committee minutes, resolutions and by-laws to authenticate and provide the best evidence of the actions attributed to the committees.

7. The court had retained jurisdiction of the claim for relief regarding the supposed ban on endorsements by central committees of candidates for non-partisan office and had denied summary judgment for plaintiffs regarding the statutes limiting dues chargeable to central committee members and prescribing the time and place of the first meetings of the committees. (J.S. App.II 70-72)

On April 24, 1984, a motions panel of the Court of Appeals filed an order granting defendants' emergency motion for a stay of the judgment of the District Court pending resolution of the appeal. (J.S.App.II a-88.) In the same order the motions panel constituted itself as the panel to hear the appeal, expedited the appeal, scheduled oral argument on the appeal for May 15, 1984 and ordered that any briefs supplementing the briefs on the emergency motion be filed on May 8, 1984.

On May 3, 1984, the District Court filed its memorandom opinion in connection with the judgment entered on April 16. (DC Doc. #92; J.S.App.II a-42.) The opinion essentially elaborated on the points made by the court at the hearing on April 9.

On May 8, 1984 defendants filed with the Court of Appeals their supplemental brief which included as an exhibit a declaration of Terence Faulkner, a member of purported plaintiff San Francisco County Republican Central Committee. The declaration established that the committee had not in fact authorized participation in this litigation and that the declaration of plaintiff Dolph Andrews filed with the District Court on April 6, 1984 (Doc. #69) stating to the contrary was false. The Faulkner declaration was executed on May 4, 1984 and included an authenticated a copy of the committee by-laws with a statement of amendments.

Also on May 8, 1984 defendants filed with the Court of Appeals a "Civil Docketing Statement" which identified the issues on appeal to include all issues raised in defendants' motions in the District Court and the sufficiency of the record to support summary judgment for

plaintiffs including abuse of discretion pursuant to Rule 56 (f). (J.S.App.II a-89.)

The appeal was argued on May 15, 1984.

On May 25, 1984, the Court of Appeals entered an order partially remanding the matter for findings on the authority of plaintiffs to bring this action in light of plaintiffs' failure to provide discovery of committee minutes and by-laws. The broader scope of plaintiffs requests for discovery and deferral of the ruling on the motion for summary judgment are not mentioned.

On June 1, 1984 the Court of Appeals' remand order was filed in the District Court. (Doc. #100.) On the same day the District Court entered its order on remand finding that each of the plaintiff central committees had authorized participation in the litigation. (DC Doc. #103; J.S.App.II a-73.)

Also on June 1, 1984, plaintiffs filed with the District Court some minutes of some purported plaintiff committees pertaining to this litigation and some of their by-laws and a copy of the Faulkner declaration. (Doc. #s 101 & 102.) No mention of these documents is found in the District Court's order on remand.

On June 18, 1984, the Court of Appeals entered an order inviting briefs from plaintiffs and defendants concerning the District Court's order on remand limited to 10 pages each.

On June 19, 1984 plaintiffs filed with the District Court a "third submission re authorization of lawsuit" containing more minutes pertaining to the litigation and more by-laws. (Doc. #s 108-109.)

On June 22, 1984, the record on appeal was mailed from the District Court to the Court of Appeals.

By August 13, 1984 all of the parties' briefs had been filed pursuant to the invitation of the Court of Appeals.

Defendants demonstrated that plaintiffs' submittals had raised serious doubt that several purported central committees in addition to the San Francisco County Republican Central Committee had authorized participation in this litigation as set forth in the First Amended Complaint. Defendants pointed out that the "further submittals" by plaintiffs affected not just the issue of authorization but demonstrated the insufficiency of the record to support the District Court's findings concerning substantial infringement and enhanced the state's justification for the challenged statutes.

On September 13, 1984 yet another submittal by plaintiffs concerning authorization was filed with the Court of Appeals and on October 16, 1984 plaintiffs filed a "notice of action" by the San Francisco County Republican Central Committee acknowledging that it had not previously authorized participation in this litigation.

On August 15, 1985 the Court of Appeals requested further briefing due to the difficulty of the issues on the constitutionality of the challenged statutes and the legal status of party central committees.

On June 18, 1986 the Court of Appeals entered its opinion and judgment affirming the findings and judgment of the District Court. (792 F.2d 802) No mention is made in the opinion of the problem of authorization in any context or of the issue of abuse of discretion pursuant to Rule 56 (f).

The Court of Appeals stayed issuance of its mandate pending resolution of defendants' appeal to this Court. (J.S.App.II a-82)

By order dated January 12, 1987, this Court vacated the judgment of the Court of Appeals and remanded for reconsideration in light of *Tashjian v. Republican Party of Connecticut*, 479 U.S. —, 107 S.Ct. 544 (1986).

On August 18, 1987 the Court of Appeals entered its opinion (826 F.2d 814) and judgment after remand affirming the judgment of the District Court. The opinion essentially reiterates the Court of Appeals' earlier opinion with

the addition of its reasons for concluding that its opinion is consistent with *Tashjian*.

The opinion was amended by order entered October 29, 1987 which added an affirmance of the District Court's order on remand regarding authorization and also denied defendants' petition for rehearing. (J.S.App.I 4a-5a) The Court of Appeal affirmed based on the District Court's finding that defendants had not challenged plaintiffs' declarations regarding authorization. The Court of Appeals and the District Court overlook the fact that defendants did not receive the declarations until after the hearing before the District Court and that some were not even filed for days thereafter. Thus, neither the Court of Appeals nor the District Court has considered the facts concerning authorization in terms of merits of plaintiffs' claims.

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SUMMARY OF ARGUMENT

The record in this case cannot justify the undermining of California's direct primary system which would be effected by the invalidation of its statutes prohibiting pre-primary endorsements by central committees of ballot-qualified political parties and prescribing the selection of members and the terms of the chairpersons of the state central committees thereof.

The ban on endorsements effectively limits each party member to a single nominating act which is his or her vote in the primary election. The nomination is the party endorsement determined by a majority vote of all persons who choose to affiliate with that party in the primary election. No official party organization may exclude anyone from that right. On these conditions the state accepts the parties' endorsed candidates on the general election ballot identified as such.

The central committees are recognized and charged by statute to conduct the *party* general election campaign for its candidates selected at the primary election. The "party campaign" is very valuable because it can attract re-

sources not otherwise available to the nominees and thereby improve the candidates' prospects for election. The existence of this institutional capacity for "unifying" the party for the general election promotes the state's interest in stable government through improving the prospect of election of state officers with a broad enough mandate to govern.

Central committees which are not representative of decisions made by party members in the primary election or have an institutional structure that unnecessarily promotes divisiveness cannot effectively perform this function. The challenged statutes prescribing systems of representative membership for state central committees and terms of chairpersons, which avoid exacerbation of the conflicting interests of Northern and Southern California by regularly alternating the chair between representatives of these regions, are necessary to promote the state's interest in stable government. Therefore, California must retain its capability to review and ratify by statute this type of party rule.

Thus, California developed its primary election system including regulation of parties participating therein to promote interests reserved to it by the U.S. Constitution as a separate political jurisdiction. Political parties which do not find the California primary system suitable to their needs can exercise their First Amendment rights to associate and support candidates other than those of the ballot-qualified parties for the state's governmental offices in the general election without regulation by the state of their methods for doing so.

Ballot-qualified political parties have chosen that status with the knowledge of the rules of the California primary election system and can be reasonably understood to have decided that the rules suit their needs better than unregulated opportunity for political association. The experience of the most successful of these parties—the Democratic and Republican—has shaped the development of that system.

As demonstrated in the Statement of the Case, *supra*, the record of the proceedings below does not establish that the parties have adopted any policies in conflict with the challenged statutes. The conclusion of the judgment below that the statutes substantially infringe on the First Amendment rights of plaintiffs as subsidiary organizations of the parties and members thereof is unjustified on the record and does not comply with the prerequisites for summary judgment as explained, pp. 21-32, *supra*.

The severity of the deficiencies in the record is exemplified by the failure of plaintiffs to demonstrate in a reliable manner that the purported plaintiff committees actually authorized participation in this litigation or adopted policies in conflict with the statutes. (pp. 16-19, *supra*) The record is so severely deficient: that plaintiffs have failed to demonstrate standing pursuant to Art. III of the U.S. Constitution; and the finding that defendants constitute a threat of enforcement of the statutes against plaintiffs violates California's rights under the Eleventh Amendment. (pp. 12-16, 27, *supra*)

ARGUMENT

I

THE CHALLENGED STATUTES HAVE NOT BEEN SHOWN TO CONFLICT WITH THE POLICIES OF THE POLITICAL PARTIES AFFECTED AND THEREFORE DO NOT CONSTITUTE SUBSTANTIAL INFRINGEMENTS ON THE RIGHTS OF SUCH PARTIES AND THEIR MEMBERS PROTECTED BY THE FIRST AMENDMENT.

In *Marchioro v. Chaney*, 442 U.S. 191 (1979) this Court held that if a state statute does not conflict with the policies of a political party, the statute does not substantially infringe on the rights of its members and organizational manifestations to associate and speak through the party protected by the First Amendment. For this reason a Washington statute prescribing the composition of the Democratic State Central Committee was upheld against a challenge by officers of the state Democratic party and prospective members of the committee.

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. —, 107 S.Ct. 544 (1986), this Court enjoined enforcement of a Connecticut statute, which barred independents from voting in partisan primary elections, in connection with the Republican primary. A conflict between the policies of the Republican party and the statute was held to be a substantial infringement on the freedom of the party and its members to associate for political purposes protected by the First Amendment. The manifestation of the party policy which established the conflict with the statute was as follows (107 S.Ct. at 547-8):

> 1. after conducting a study the state central committee recommended to the Convention of the Party that its rules be amended to allow independents to vote in the Party primary election;
>
> 2. the Convention adopted the recommendation and amended the rules;
>
> 3. the Republican leadership in the state legislature introduced legislation to amend the statute barring participation of independents to permit their participation in the Republican primary but the Democratically controlled legislature defeated the measure substantially along party lines.

The importance of the convergence of each of these three elements to demonstrate the position of a political party is manifested by analysis of what a political party is today. Parties have been described as "three-headed political giants" composed of the "party organization", the "party in office" and the "party in the electorate".[8] (F. Sorauf, *Party Politics in America* 8-11 (5th ed. 1984)

8. In his dissent in *Tashjian*, Justice Scalia notes the absence from the manifestation of the party policy of any concurrence by the "party in the electorate" and suggests the possible unreliability of ascertaining the position of the party without it. (107 S.Ct. at 560) This insight should demonstrate that the manifestation of party policy by the other two elements of a party together with the evidence of open deliberation and vote, which existed in the *Tashjian* case, should be the minimum required to establish a conflict between a statute and party policy.

Without a clear demonstration that each of these elements concurs in a representation of party policy which conflicts with a statute affecting the activities of the party, a court cannot be assured that invalidation of a statute, rather than its affirmance, actually constitutes a substantial infringement on the political rights of the party and its members protected by the First Amendment. In that event a court would be substituting its judgment for that of the party in determining what is in the best interests of the party which this Court has repeatedly cautioned should never occur (*Tashjian, supra,* 107 S.Ct. at 554):

> "'And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.'"[9]

The judgments below have failed to follow this admonition with the result that in all likelihood the political rights of the political parties affected and of their members have been severely prejudiced. Moreover, the state's interests in promoting stable and democratic government have been unjustifiably preempted.

The plaintiffs cannot in any meaningful sense be said to represent the policies of their respective political parties in and of themselves or on the record of this case described in the foregoing Statement of the Case.

Of the 58 Democratic county central committees, only six are purportedly plaintiffs in this litigation. They don't

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9. Some lower courts have shown an inclination to respect this admonition. In *Ripon Society v. National Republican Party,* 525 F.2d 567, 582 (D.C. Cir. 1975), *cert. den.,* 424 U.S. 933 (1976):

> "In requesting that we impose a one person, one vote rule on the Republican Party, plaintiffs are not asking us to correct a historical aberration contrived at the 1972 convention. They are inviting us to take into judicial hands a process of change and adaptation that still continues within the party. [¶] We have twice declined that invitation. . . ."

Judicial intervention in the internal affairs of their respective parties is precisely what plaintiffs are seeking in this case.

agree amongst themselves as to which of the statutes challenged in this litigation are not, in their opinions, in the best interests of the California Democratic Party.

The largest purported plaintiff committee, the Los Angeles County Democratic Central Committee, did not challenge any of the statutes invalidated by the courts below. The by-laws of none of the purported plaintiff county central committees nor of the state central committee contained in the record below conflict with the challenged statutes. No other Democratic organizations or officers are parties to this litigation.

The only Republican organization purportedly a party to this litigation, the San Francisco County Republican Central Committee, did not authorize participation therein until after the case had been pending in the Court of Appeals for several months. (p. 29, *supra.*) This purported plaintiff did not challenge the statute prohibiting endorsements by central committees of candidates for their party's nomination. The by-laws of the Republican State Central Committee set forth in the record do not conflict with the challenged statutes including those which prescribe the terms of its chairperson and selection of its members.

Thus, Republican and Democratic plaintiffs, organizational and individual, have not demonstrated that their challenges to the statutes invalidated below are anything but quarrels with the policies of their own parties. There is nothing in the record of this case which disproves the fact of which this Court has virtually taken judicial notice (*Anderson v. Celebrezze,* 460 U.S. 780, ftn. 30 at 803 (1983): ". . . the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state-legislatures . . . ". Moreover, it is undisputed on the record below that the parties in the legislature acquiesce in legislation brought by the other regarding its party organization and procedure. (p. 24, *supra.)*

The Libertarian plaintiffs, which are the former chairperson of and purportedly the state central committee, do not challenge the statutory prescription for selection of its membership. There is nothing in the record indicating that the by-laws of the Libertarian State Central Committee conflict with the statute prescribing the term of its chairperson. There is nothing in the record demonstrating that the Libertarian Party has ever sought exemption through legislation from the statutory prohibition on endorsements by central committees of candidates for its nomination in the primary election or has sought to change the statute which prescribed the term of the chairperson. There is evidence that someone caused legislation to be introduced in its name in the legislature to change other aspects of the statutes governing its structure and procedure (p. 17, *supra*).

Thus there is nothing in the record which would preclude drawing the inference concerning ballot-qualified parties, such as those affected by this litigation, that these parties intentionally forgo control of their own identity in order to become vehicles for running a stable and democratic California governmental system. The California electoral system is designed to produce such parties for just that purpose.

From the perspective of ideological purity and organizational coherence, ballot-qualified parties are in plaintiffs' view "weak" parties. However, the minimal amount of power perceived by plaintiffs to reside in party organizations, which it is the avowed purpose of plaintiffs to remedy through this litigation, is not attributable to the statutory prohibition on endorsements by party central committees[10], the prescription of the composition of state central committees and limitation of the terms of the chair-

10. Plaintiffs' own declarant provides research indicating that an overwhelming majority of voters do not believe that endorsements of candidates by their party organizations is meaningful and don't give them any weight in deciding for whom to vote in the party primary. (p. 20, *supra*.)

persons. There are much more pervasive and momentous social and technological factors, such as television and computerized public opinion polls, which explain the "decline" of official party organizations noted throughout the nation. Arthur M. Schlesinger, Jr. concludes:

> "One thing is clear: we will not attain a working political system simply by fiddling with party rules and structure, nor by trying to reclaim a vanished past through act of will. We will attain it only by remembering that politics in the end is the art of solving substantive problems."[11]

Even if plaintiffs are ultimately successful in persuading their parties that they should change their nature from a vehicle for governance to ideological faction, as long as they choose to persist as ballot-qualified parties California has vital interests that are served by insisting that central committees not endorse candidates for their party's nomination in the state's primary election and that

11. *The Cycles of American History*, Chap. Ten, "The Short Happy Life of American Political Parties", (Houghton Mifflin 1986) pp. 256-276 at 276. At pp. 272-273 Professor Schlesinger states:

> "The electronic age threatens the withering away of the traditional political party. Can the party system be saved?
>
> "Political scientists propose structural remedies: formal party membership; midterm party conferences; local party caucuses; binding party discipline and accountability; in short, the revitalization of the party through stronger rules and regulations. I must confess skepticism. The effort is to call the old parties from the vasty deep. It is not likely that they will come when we do call for them, even with the incantations of rules and regulations. Proposals to centralize the parties run against the historical grain of American politics as well as against the centrifugal impact of the electronic age. Actually some of the much-abused reforms have already given the parties new institutional and financial strength as national organizations. Yet, for all this, the party continues to decay as a force in politics. Carried too far—the mid-term party conference, for example—efforts to discipline the party only speed up the process of dissolution."

rules regarding structure and organization of the party central committees be subject to review and ratification by the state legislature.

Once they have disbanded their parties as ballot-qualified or initiated new parties, California provides means for such parties to qualify their candidates for office in the general election which do not involve state regulation of their activities as political parties.

II

CALIFORNIA'S INTEREST IN PRESERVING ITS PARTISAN PRIMARY ELECTION SYSTEM TO PROMOTE STABLE AND DEMOCRATIC GOVERNMENT OVERRIDES PLAINTIFFS' INTERESTS IN HAVING THEIR PARTY ORGANIZATIONS FREE TO ENDORSE CANDIDATES FOR THEIR NOMINATIONS AND TO DETERMINE THEIR MEMBERSHIP AND THE TERMS OF THEIR CHAIRPERSONS WITHOUT REVIEW AND RATIFICATION BY THE LEGISLATURE.

As the opinion of the Court of Appeals in this case notes, at the turn of this century California adopted a direct primary election system "which transferred the power to nominate candidates from party organizations to the voters themselves." (826 F.2d at 819)

The system is "closed" in the sense that only voters who are officially registered with state election agencies as being affiliated with a particular party may vote the ballot of that party in the primary election conducted by the state for the nomination of the party's candidates for partisan office. (Cal. Elec. Code § 501) The candidate who receives the most votes in the primary election conducted for a party for a particular office is the only candidate who may be designated on the general election ballot as the candidate of that party for that office. (Cal. Elec. Code § 6610)

In *Storer v. Brown*, 415 U.S. 724, 735-736 (1974) this Court held that California could prohibit a candidate defeated in a party primary from qualifying as an independent to run against the party nominee in the general election in order to enhance the stability of the ballot-qualified parties in the general election in furtherance of the state's interest in having the general election result in state officers who have sufficient support to govern effectively.

However, the state does not conduct primary elections for all political parties. Only those parties which meet criteria of demonstrable support among the voters of the state are eligible to have their nominating elections conducted by the state. (Elec. Code § 6430)

Political parties may choose not to avail themselves of the state-conducted primary elections to select their candidates for office. The state provides these parties with other means of placing their candidates on the general election ballot although the candidates' party affiliations do not appear on the ballot. Such parties are not subject to regulation by the state as political parties.

Voters are not required to declare their affiliation with a political party as a condition of voting in the general and non-partisan elections even if they are in fact affiliated with a political party. (Elec. Code § 501) A party whose members do not register with state election agencies as being affiliated with it does not qualify to have its nominating elections conducted for it by the state unless the party petitions the Secretary of State and makes a special showing of support among the electorate. (Elec. Code § 6430, subds. (b) and (c))

When a party chooses to become ballot-qualified it and its adherents loose their ability to determine who may be affiliated with them. In exchange for the state conducting the nominating elections for a political party, the state requires that all voters who choose to officially affiliate with the party be eligible to vote in the party's primary election (Elec. Code § 10200.5) and, with a demonstration of support from other such members of the party, become a candidate for the party's nomination in the primary election (Elec. Code §§ 6495 & 6501).

Thus, a party which chooses to become ballot-qualified agrees to become a potential "umbrella" party and can fairly be said to aspire to that status by virtue of its choice to become ballot-qualified. California uses its electoral system to promote the existence of "umbrella" parties in furtherance of its interest in the stability of its political system because such parties are an effective device for mitigating "unrestrained factionalism [which] may do signifcant damage to the fabric of government" (*Storer v. Brown*, 415 U.S. 724, 736 (1974)).

The manner in which "umbrella" parties perform this function has been described in terms of the national Democratic and Republican parties (A. Ranney, *Curing the Mischiefs of Faction* 201 (1975)):

> "[E]ach party has sought winning coalitions by attempting accommodations among competing interests it hopes will appeal to more contributors and voters than will the rival accommodations offered by the opposition party. This strategy, it is conceded has resulted in vague, ambiguous, and overlapping party programs and in elections that offer the voters choices between personalities and, at most, general programmatic tendencies, certainly not unequivocal choices between sharply different programs. But this . . . is not a vice but a virtue, for it has enabled Americans through all but one era of their history to manage their differences with relatively little violence and to preserve the world's oldest democratic regime."

As Ranney's analysis indicates, parties which aspire to "umbrella" status will be inclined to conduct their activities in a manner which contributes to the state's interest in stable government. Such parties will tend to have a coincidence of interest with the state and will therefore willingly and knowingly seek access to the primary election ballot for the very reasons that the state offers that opportunity. (See, Scott and Carr, "Political Parties Before the Bar: The Controversy Over Associational Rights", 5 Univ. of Puget Sound L. Rev. 267, 276-279 (1982).)

In opting to participate in the primary election as it exists in California, a party knowingly and willingly surrenders its prerogative to determine its own membership and in effect chooses to permit its identity to be determined democratically by vote of all persons who simply officially associate with it for whatever reason (Scott and Carr, *supra*, at 278:

> "Thus, the primary election provides insight into the policy objectives of the party as a whole. Party candidates for elective office are presumed to represent the wishes of the majority of the party on a wide range of political issues. These candidates, in other words, are not just candidates for elective office in the general election; from the standpoint of intra-party politics, they represent the party position on issues that concern party identifiers."[12]

In effecting this result, the primary election system not only promotes the state's interest in the stability of its governmental system but the related and, as this Court has recognized (*American Party of Texas v. White*, 415 U.S. 767, 781, ftn. 15 (1974), separate interest in the "democratic management of the political party's internal affairs").

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12. The Court of Appeals attached great significance to the fact that state legislators had substantial representation on state central committees of their parties, suggesting to it that the legislators effectively controlled the committees, which were therefore in some unexplained way unrepresentative of their parties. (826 F.2d at 820, 824, 827, 828.) The composition of the Democratic State Central Committee was used as the example. (Id.) There are 1700 members of that Committee. (Kelly decl., M.A.D. 66a) Assuming that all seats in the legislature were held by Democrats (they hold approximately 60%), the legislators could occupy and appoint a total of 400 memberships. It is completely unrealistic to assume that the legislators will vote as a block on any issue and even if they did they could be out-voted 4-1. Defeated nominees of the party also occupy seats and make appointments. (826 F.2d at 820) Together with the legislators they would account for approximately 400 seats and could be out-voted 4-1. However, even if they occupied every seat on the state central committee they could hardly be deemed unrepresentative of the state party.

These interests of the state and the self-interest of political parties which aspire to the status of an "umbrella" party coalesce and coincide in California's closed primary system and its implementing statutes which affect the ballot-qualified political parties. These statutes manifest the symbiotic relationship between ballot-qualified political parties and the state.

The evolution of the statutory ban on endorsements by central committees of ballot-qualified parties of candidates for their parties' nominations in the primary election (Elec. Code § 11702) illustrates the coincidence of interest and symbiotic relationship between the state and ballot-qualified parties.

Prior to the adoption of a primary election system in California around the turn of the century, the major political parties prohibited their central committees from endorsing candidates for their parties' nominations at their conventions. (J.S.App.II 142-3) The reason for this prohibition was that the committees organized and put on the party nominating conventions so that official endorsements by the committees would impair the legitimacy and credibility of the conventions and the candidates chosen thereby in the eyes of backers of losing candidates with obvious negative effects on the party's prospects in the general election. (J.S.App.II 146-7)

After the advent of the primary election system, the central committees existed primarily to carry on their *parties'* campaigns in the general election for their candidates chosen at the primary election. (J.S.App.II 145-6) This role of the central committees was valuable to the parties because it provided a vehicle for securing resources for the election of the nominees available from candidates who were defeated in the primaries and their backers which might not otherwise be available directly to the nominees themselves. (J.S.App.II 107-8) The prohibition on endorsements of candidates by central committees continued to be the practice of the California Republican and Democratic parties because such activity could impair or preclude the effectiveness of the central committees in their role as catalysts of party cohesiveness for the general election. (J.S.App.II 107-10; J.A. 63-65)

Eventually the existence of party central committees was established in statutes which recognized that virtually their only function was to conduct their parties' campaigns for their nominees in the general election. (J.S. App.II 144) The prohibition on endorsements continued as a matter of the policy and practice of the parties and was viewed by state officials and party organizations as being consistent with the primary election system and the best interests of the parties. (J.S.App.II 107-10)

The policy of the ban on endorsements by central committees was not expressly adopted by statute until 1963 when it was enacted as part (§ 11702) of the Truth in Endorsements Law. (Elec. Code, § 11700 et seq.) This statute prohibits publications appearing to endorse candidates for the nomination of a ballot-qualified party in primary elections that utilize identifying words contained in the name of the party unless a prescribed statement that the "endorsement hereon is by an unofficial political group" appears on or in the endorsement publication. (Elec. Code §§ 11703-5, 11708-9)

The statute was enacted to combat a widespread practice of particular organized factions within the ballot-qualified parties of publishing slates of endorsements which misled voters into believing the endorsements had been made by official party organizations. (Elec. Code § 11701(3)) This practice is considered a fraud because in California the primary election is the means the ballot-qualified parties have chosen to "endorse" their candidates and pursuant to that choice central committees of such parties had never endorsed candidates for their parties nominations. (See, *People v. Crutcher*, 262 Cal.App. 2d 750, 752-753; 68 Cal.Rptr. 904 (1968).)

The California Democratic and Republican parties had witnessed the evolution of unofficial associations of party members, such as the California Democratic Council (CDC) and the California Republican Assembly (CRA),

for the purpose of making endorsements in the primary elections, their identification with well organized ideological factions within the parties and the detrimental effect that identification had on the fate of the parties' nominees in the general election. (See, *Dancing Bear: An Inside Look at California Politics, by Gladwin Hill,* (World Publishing Co. 1968) pp. 160-161, 211-212, 217-218, 248, 252, 254-255.)

The introduction of such a dynamic into the central committees was and is clearly perceived by the parties as inconsistent with and destructive of the role of the central committees and of the parties (*Dancing Bear, supra,* at pp. 160-161):

> "As the purported voice of party rank-and-file, serving as a power base for office-seekers and office-holders, the CDC claimed the right to a major role in formulating party policy. This pretension quickly became a bugbear, both to the party's 'legal' hierarchy, concerned with unifying a membership that extended far beyond the 50,000 CDC activists, and to the office-holders. For an office-holder, CDC pronouncements tended to commit him to controversial positions and reduce his most valuable asset as a politician-the flexibility to maneuver."

Appellants believe that the Democratic and Republican parties manifested in both the offici organizations and in the Legislature caused the Truth and Endorsements Law, including the ban on endorsements by central committees, to be enacted to enable the parties to enforce their own policies as to proper methods of determining their identities.[13] Such policies probably could not have been enforced by the party and its members in state court in the absence of the statutes. (Cf. *Malone v. Superior Court,* 40 Cal.2d 546, 551-552; 254 P.2d 517, 520 (1953).)

In causing enactment into statute of the restriction of party members to one official nominating act—their vote

13. The defendants timely requested the opportunity pursuant to Rule 56 (f), Fed.R.Civ.P., to conduct discovery on this issue which was denied by the District Court. (pp. 21-25, 28, *supra*.)

in the primary election—the parties invoked the state's interest " 'of confining each voter to a single nominating act' " (*Tashjian, supra,* 107 S.Ct. 544, ftn. 13 at 554). This state interest is directly related to its interests in the stability of its political system and in the democratic management of its political system of ballot-qualified political parties (*American Party of Texas v. White, supra,* 415 U.S. at ftn. 15, p. 783; see also, Scott and Carr, *supra,* at 279) which are inherent in its direct primary election system.

The parties have also caused the portions of the by-laws of their state central committees pertaining to the composition of those committees and the terms of their chairpersons to be enacted into law. (J.S.App.II 106) The existence of these statutes enables the party and its membership to enforce the by-laws in state court as noted *supra* at p. 54, to settle credentials disputes. Utilization of a neutral arbiter of credentials disputes mitigates potential divisiveness within the state central committee which could interfere with its role in uniting the party for the general election. Th parties' interests in stability coincide with the interests of the state.

The statutes concerning the structure of the state central committees reflect the by-laws of those committees and are enacted as requested by a party represented in the Legislature without interference from the other party as a matter of comity and custom. (J.S.App.II 106) The statutes regarding the composition of the state central committees of the different parties vary significantly in accordance with the by-laws of each committee although they follow a similar pattern. (J.S.App.II 149-231) The pattern is of some system for assuring that the full spectrum of significant groups of adherents to the party are represented in order to maximize cooperation among these groups in supporting the parties' candidates in the general election.

The provisions regarding the terms of the chairpersons of the state central committees have a similar fea-

ture which reflects the state central committees' accommodations in their by-laws to a perennially transcendent phenomenon in California politics (*Dancing Bear, supra,* at 23-24):

> "Only nine years after California embarked on statehood, the problems of holding it together as a state seemed insuperable. The legislature voted to separate its northern and southern portions into two states, and enactment was duly signed by Governor John B. Weller on April 19, 1859. Only Congress' preoccupation with the impending Civil War prevented the necessary Federal ratification. And to this day the essential existence of two Californias, northern and southern, is formally recognized in a number of state laws drawing explicit sectional distinctions."

Each of them alternates the occupancy of the chair between representatives of Northern and Southern California (Elec. Code §§ 8774, 9724 and 9816) in the interests of avoiding sectional identification of the party and unnecessary conflict within the committee which could impede its role of unifying the party for the general election. The limitation on the term assures that the rotational system will occur with sufficient regularity to prevent regional friction from reaching a "critical mass."

This interest of the parties coincides with the state's interest in promoting by statute the duty of the state central committees to carry out their parties' campaigns for their nominees in the general election.[14] The imposition of this duty by statute is not challenged in this litigation. (Cf. *Marchioro v. Chaney,* 442 U.S. 191, 196-197 (1979).)

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14. The state central committees are mandated by statute to "conduct campaigns for this party and in behalf of the candidates of the party" and this is virtually the sole duty mandated by statute to these committees. (Elec. Code §§ 8775 and 8940 (Democratic Party); 9276 and 9440 (Republican Party); 9688 and 9740 (American Independent Party); 9819 and 9850 (Peace and Freedom Party). Elec. Code §§ 8940, 9440, 9740 and 9850 mandate county central committees in similar language:

> "A committee shall have charge of the party campaign under general direction of the state central committee or of the executive committee selected by the state central committee."

The invalidated statutes apply only to ballot-qualified parties and exist to promote the compelling interests which underlie the state's primary election system. Ballot-qualified parties have essentially chosen that status and the state regulations associated with it as being in their best interests.

California permits political parties to avoid that status and the associated regulation but still qualify its candidates for the general election ballot through independent candidacies (Elec. Code § 6400 et seq.) or write-in procedures (Elec. Code §§ 17100-1). There is no requirement in the U.S. Constitution that a state elect its governmental officials through methods other than these.

When a state chooses to conduct nominating elections for political parties and provide automatic access to and identification on the general election ballot for candidates of the parties, it may establish conditions to this privilege so long as the conditions do not invidiously discriminate among the political parties. (*American Party of Texas v. White, supra,* 415 U.S. at 780-1) Since the invalidated statutes operate in the same manner with respect to any party which chooses to become ballot-qualified, such a consideration would not be present in this case.

It is the choice of the party whether its interests are best served through participation in the state's primary election system with its associated regulation of ballot-qualified parties or through use of the other methods available to qualify its candidates for the general election ballot which keep it free of state regulation.

Thus, it is not California's purpose in maintaining the challenged statutes to "protect the parties from themselves", as the Connecticut statute invalidated in *Tashjian* attempted to do, rather it is to implement its primary election system to enhance its vital interest in stable and democratic government which this Court reaffirmed in *Tashjian* is a valid and overriding interest.

As is apparent from the fact that political parties with such diverse messages and programs as the Libertarian, Peace and Freedom (Cal. Elec. Code § 9750) and American

Independent (Cal. Elec. Code, § 9600) parties have been ballot-qualified in California, its regulation of such parties as challenged in this litigation does not affect the content of their messages and programs. It is equally apparent from its inability to cite to the record but only to "commentators", another lower court decision relying on the same sources and its own speculation, that the Court of Appeals' conclusion that the challenged statutes "inevitably color[] the message that the parties communicate to the electorate" has no support in the record of this case or in proven fact subject to judicial notice.

Since California has an overriding interest in the challenged statutes which have not been shown to affect the actual message and program of political parties implicated in this litigation, the statutes don't impermissibly burden the First Amendment rights of those parties or of the plaintiffs herein associated with them.

Moreover, when a party chooses not to become ballot-qualified or to withdraw from this status because it does not deem compliance with such statutes to be in its best interests, it is not being deprived of a benefit by refusal to forgo a right protected by the First Amendment which is prohibited pursuant to *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) and *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming the judgment of the District Court should be reversed with instructions to remand to the District Court for entry of judgment in favor of defendants.

DATED: July 1, 1988.

Respectfully submitted,

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